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No. 01-893

In the
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,
Petitioner,
v.
CITY OF NAPA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of California

PETITIONER'S REPLY TO THE OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

At bottom, this case raises the question of whether and how courts should scrutinize attempts by a local government to impose the off-budget costs of worthy social programs on landowners who must obtain permits from that government. Petitioner submits that attempts to make landowners the deep pockets for socially desirable housing programs may be expedient, but unless a City can justify such cost-shifting in the face of ***meaningful*** judicial review, there has been a "a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

I

THE ORDINANCE FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST

A. Admirable Social Goals Alone Do Not Justify Exactions

Respondent suggests that the lower court correctly concluded "that creating affordable housing opportunities is a legitimate state interest." Respondent's Brief in Opposition (Opp.) at 2. Of course it is. So may be creating skateboard parks, hiring street sweepers, or sending local politicians on "fact-finding" missions to foreign cities. But that does not mean that persons wishing to develop new housing should bear the brunt of subsidizing such parks, street sweepers, or political junkets–unless the City can make some kind of credible case that new home builders create a particular need for such things over and above the general public. Low-income housing is no different. Unless the City can show that persons building new homes and apartments are responsible for a shortage of low-income housing, they should not have to pay more than their fair share to ameliorate the problem. The difficulty here is that programs that pass the costs of desirable programs to a small minority of taxpayers are politically popular. As a result, some,

but not all, state and lower federal courts have been loathe to apply the standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to development exactions when they are imposed legislatively or involve alternatives to outright land dedication. This Court should grant review to explain the true reach of the Takings Clause.

B. The City Has Not Justified Shifting the Cost of Low-Income Housing to the Builders of New Housing

To put it simply, landowners in the City of Napa are being conscripted to buy and build the City out of a perceived shortage of low-income housing that is the City's own fault. Respondent insists, however, that the City has fully justified the ordinance by referring to the 700-page administrative record of analyses, studies, and other materials. Respondent claims, for example, that the ordinance was, "adopted after years of study, consideration, and input." Opp. at 6. But ***none*** of this study or input addressed the question of whether developers of new homes in any way contributed to a shortage of affordable housing. Respondent does not and cannot cite to a single sentence anywhere in that record that even purports to demonstrate, or even discuss, ***any*** kind of relationship between the construction of new housing at market rates and an exacerbated need for subsidized low-income housing. The reason is simple. Outside of a few precatory sentences in the ordinance itself, there is none.[1] The city merely dumped into the record 700 pages of hearings and studies about low-income

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[1] Intervenor-Respondents' record citations are quite unhelpful. *See* Brief in Opposition for Respondents Napa Valley Community Housing, et al. (Int. Opp.) at 4. The record cites are to (1) the Ordinance itself (JA at 356), (2) a General Plan excerpt showing only that home builders concentrate on single family homes (JA at 550), (3) a study on the impact of *commercial* development on housing (JA at 686), and (4) the Intervenors' trial complaint! (JA at 794.)

housing needs in the City and elsewhere; but ***none*** of those studies or analyses ***anywhere*** claim that new home construction is the cause of any such shortage.[2]

Respondent continues that "in direct contradiction to Petitioner's statement that no evidence demonstrated that new residential housing contributes to the City's need for low-income housing . . . the City Council made numerous findings." Opp. at 7. But Respondent has not and cannot point to a single line in the record that provides any support for any of the City Council's "findings." As for these findings, Petitioner actually agrees with one of the underlying premises: that the City's Urban Limit line contributes to the shortage of affordable housing. *See* Opp. at 7; Appendix to Petition for Writ of Certiorari (App.) at G-7, ¶ 2(F). But, the City Council's assertion that the construction of new homes and apartments, in contravention of the basic economic theory of supply and demand, exacerbates housing prices is rather speculative, to put it mildly. If the City desires to impose the burden of subsidizing low-income housing on the builders, buyers, and renters of new market rate housing, then it should be held to a higher burden than one met by the sort of data-free conjecture engaged in by Respondent and the laissez-faire review by

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[2] Incredibly, Respondent suggests that Petitioner "not once in this litigation" has ever mentioned or challenged the existence of, or factual support for, the City Council's legislative findings. This misstates the record. *See, e.g.*, Plaintiff's and Petitioner's Points and Authorities in Opposition to Demurrer at 2-11 (discusses the findings and the lack of record of support for those findings); Appellant's Opening Brief (filed in the court of appeal) at 6-15 (same). Furthermore, Petitioner has noted repeatedly that in every development permit granted by the City prior to passage of the ordinance, it expressly found that there would be no adverse impact on affordable housing. *See, e.g.*, court of appeal Joint Appendix (JA) at 8, Complaint ¶ 22.

the court below. Only this Court can reestablish the proper standards.

C. The Ordinance Imposes an Unlawful Exaction

Respondent also suggests that the requirement that builders either pay a fee or sell or rent housing at below-market rates is not really an exaction, but resembles more ordinary zoning setback requirements, for example, "[b]ecause . . . [it] limits the use of a small percentage (here ten percent) of property." Opp. at 6 n.7. *See also* Int. Opp. at 18. There are two main flaws with this argument. First, there is an obvious justification for setback zoning in that the development of real property creates a need for setbacks which are often an integral part of the construction project. Reasonable setbacks, for example, promote the circulation of air, prevent the spread of fires, and prevent excessive shading of neighboring properties. *Gcrieb v. Fox*, 274 U.S. 603, 609 (1927). A second and more fundamental objection to the characterization of the ordinance here as mere zoning is that the ordinance destroys the fundamental right to freely alienate a portion of the property by telling landowners to ***whom*** to sell or rent their property and ***how much*** to charge in sales price or rental–without regard to whether this may result in a loss to the landowner. This sort of interference with an owner's use of property is substantially more intrusive than an ordinary setback. And as such, it requires a more exacting review by the courts than a highly deferential rational basis standard.

Another reason why this Court should grant the petition is to instruct the state and lower federal courts that heightened scrutiny cannot be evaded by redefining "exactions." Respondent claims that the ordinance "does not require either a dedication or an exaction. Rather, it is a land use regulation which simply restricts the use of a very small percentage of a landowner's development." Opp. at 1. Clearly, the requirement here is an exaction. Landowners must dedicate a portion of

their development efforts and property to a low-income housing subsidy, or pay cash and substitute one form of exaction for another. A builder who satisfies the ordinance by actual construction will be dedicating land at a below-market price when he sells the unit. Exactions are defined in the literature as "[t]he process by which developers are required, as a condition of development approval, to dedicate sites for public or common facilities; construct and dedicate public or common facilities . . . make payments to defray the cost . . . of facilities . . . or otherwise provide . . . public amenities." Margaret Sohagi, *Exactions and Impact Fees in California* 15 (Solano Press 2001).[3] Respondent cannot avoid the impact of *Dolan* by claiming landowners may pay an in-lieu fee instead of building low-income housing. Many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved fees: "All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash." 512 U.S. at 400 (Stevens, J., dissenting).[4]

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[3] Furthermore, the City obviously believes that the in-kind requirement (constructing the unit), land dedication, and the in lieu fee are effectively the same–otherwise the ordinance would not allow compliance through these other methods. Indeed, the City staff itself described the program in terms of many other exactions, comparing it to the provision of "roads, water, parks, and schools." Napa City Council, Agenda Summary Report, March 3, 1999, *reproduced in* City's request for judicial notice, Exhibit 5, JA at 322.

[4] Nor can the impact of this Ordinance on landowners be avoided by any so-called "incentives." Opp. at 8 n.8, Int. Opp. at 6-7, 13. Respondent asserts first that "developers meeting the inclusionary requirement will receive, as a matter of right, preliminary development review, expedited processing, fee deferrals, and marketing assistance." *Id.* But because all developers are required to meet the requirements, expedited reviews and processing are

(continued...)

D. Heightened Judicial Review Is Appropriate

The reason, of course, that Respondent wishes to recharacterize this Ordinance as a simple zoning measure not involving an exaction is that Respondent believes that a zoning measure will be insulated from meaningful judicial review.

However, as this Court recognized in *Nollan*, such deference is unwarranted when government uses its power to impose conditions that are unrelated to any provable impact caused by the development. And, of course, this Court held that the government has the burden of proving that such an impact is roughly proportional to the exaction in *Dolan*, 512 U.S. at 391 & n.8.[5] The holdings in *Nollan* and *Dolan* follow naturally from the standard in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that a regulation must substantially advance a

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[4] (...continued)
not much of an advantage. Fee deferrals refer only to a delay in having to pay the fees. *See* App. at G-34, Municipal Code § 15.94.050(F)(1)(c). As for "marketing assistance," all that means is that the City will buy any unsold subsidized units when a certificate of occupancy is issued. App. G-34, § 15.94.050(F)(2). Home builders, however, are not in the least bit worried that they will be unable to sell or rent units for substantially less than their market value. Finally, Respondent suggests "[o]ther discretionary incentives" are available. Opp. at 8-9 n.8. *See also* Int. Opp. at 6-7. However, as Petitioner noted previously, Pet. at 6, the "incentives" of Municipal Code § 15.94.050(F)(2) are available only to home builders who ***exceed*** the requirements of the ordinance, specifically those home builders who meet the requirements of a separate ordinance, Chapter 17.84. *Compare* App. at G-34, Municipal Code § 15.94.050(F)(2), and G-29, Municipal Code § 15.94.050(A), *with* Ch. 17.84 *reproduced at* App. I. With or without any incentives, however, there is no doubt that landowners must give up ***something*** of value in exchange for a development permit.

[5] As noted, *see* Pet. at 12, the exactions in both *Nollan* and *Dolan* were broadly applicable and followed from legislative enactments.

legitimate governmental interest.[6] It is simply not legitimate to condition the use of real property on paying a ransom that is unrelated to the proposed use.

It is the lack of an adequate nexus between the exaction and the use of property that counts, not the precise nature of the exaction. Thus, when the court of appeal below found that the nexus standard of *Nollan* and the rough proportionality test of *Dolan* apply only to nonlegislatively imposed exactions of real property, it was wrongly focusing its attention entirely on the nature of the exaction, rather than on the impediment that is being imposed on the exercise of the constitutional right. In other words, what is unconstitutional is that a landowner is forced to undertake an involuntary action that is not related in any real degree to any impact caused by the proposed use of the land. The particular type of involuntary action and the manner of imposition is far less important to the analysis than is the lack of nexus and proportionality.[7]

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[6] Because the Takings Clause claim is based on allegations that the Ordinance fails to substantially advance a legitimate governmental interest, Respondent's and Intervenor-Respondents' discussion of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is irrelevant. Opp. at 21, Int. Opp. at 10-12. Petitioner is not alleging a denial of economically viable use; thus there is no need to "balance" and no need to determine the scope of economic injury from an application of the Ordinance. Even if *Penn Central* applied, it does not undercut Petitioner's argument. Building an office tower on top of a landmark would have had an obvious impact on an existing landmark. Here, in contrast, the Ordinance is not concerned with developers who may seek to ***replace*** existing low-income housing, but all developers of market rate housing.

[7] Intervenor-Respondents claim Petitioner never alleged that the Ordinance can "never" be constitutionally applied. Int. Opp. at 1, 16. This is ridiculous. The complaint at Paragraphs 23-27, JA at 8-9, speaks for itself.

A recurring theme by which Respondent tries to avoid the nexus logic of *Nollan* and the rough proportionality test of *Dolan*, and by which it seeks to distinguish those conflicting cases that have applied heightened scrutiny either in the context of a legislatively enacted exaction or an inclusionary zoning requirement, is to suggest that this Court changed everything in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *See, e.g.*, Opp. at 2, 13, 15-17. *City of Monterey*, of course, questioned the extension of *Dolan*'s rough proportionality test to permit ***denials***; it did not purport to address any limits on the applicability of *Nollan*'s nexus language. *See, e.g.*, 526 U.S. at 702-04. *City of Monterey* was filed and argued in the lower courts before *Dolan* was decided by the Supreme Court. One of the key arguments raised by the landowners in *City of Monterey* was that the City's denial of the landowners' permit applications failed to substantially advance a legitimate governmental interest. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996). When this issue was presented to a jury, the jury found that the landowner was correct and that the city had no reasonable justification for its permit denials. *Id.* at 1429; *City of Monterey*, 526 U.S. at 701. On appeal, the Ninth Circuit recognized that the newly articulated "rough proportionality" standard in *Dolan* was related to the "substantially advance" standard of *Agins*. It then extrapolated the rough proportionality standard to a challenge based on an allegation that the permit denial failed to substantially advance a legitimate governmental interest. *Del Monte Dunes*, 95 F.3d at 1430.

But, as this Court held, this was inappropriate. *City of Monterey*, 526 U.S. at 702-03. First of all, "rough proportionality" is an unhelpful standard when addressing a permit denial. In *Dolan* the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce that impact. But such an

approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest–after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on ***excessive exactions*** but on denial of development." *City of Monterey*, 526 U.S. at 703 (emphasis added).

However, nothing in this Court's *City of Monterey* decision limited the application of *Dolan*'s rough proportionality test only to dedications of land. In saying that "this Court has [not] provided . . . a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," 526 U.S. at 704, it was referring to ***both*** exactions and dedications. Indeed, a land dedication is merely a subset of the universe of exactions. *See, e.g.*, Sohagi, *supra*, at 15.

In short, the *City of Monterey* decision did nothing to erase the conflict in the state and lower federal courts over the appropriate standard of review. The conflict remains in the state and lower federal courts over when to apply a more searching standard of review to exactions imposed as a condition for a development permit.

Finally, because any application of the Ordinance will require landowners to give up something in exchange for a permit, landowners suffer an immediate and adverse impact on their rights in property. Because this impediment on the interests of landowners was effected by the passage of this law, the Takings Clause claim based on a failure to show either nexus or rough proportionality is ripe for review.

II

THE ORDINANCE WILL DEPRIVE LANDOWNERS OF DUE PROCESS

One of the major objections to the Ordinance is that it will require owners of rental housing to rent their homes and apartments at subsidized below-market rates in perpetuity. Pet. at 26-30. Respondent seeks to recharacterize this problem, insisting that Petitioner is demanding application of a " 'fair return' " analysis to land use regulations governing new development." Opp. at 23. Not so. Petitioner is not seeking here a guarantee of any kind of return on new development. Rather, Petitioner is concerned that after 10% of the units are set aside for low and very low-income housing, the present and subsequent owners of those units will never have any opportunity to adjust rents in order to ensure a fair return, capture capital improvements, or otherwise increase rents to account for changed and unforseen circumstances between now and the end of time. In this regard, the "in perpetuity" requirement to hold rentals at rates tied only to a percentage of the median income of Napa residents is unlike every other rent control ordinance in the nation.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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